

MEMORANDUM

Subject: Freedom of Information Act (FOIA)
for Environmental Documentation

From: Director, Office of Environmental Policy
Washington, DC

To: Regional Federal Highway Administrators
Regions 1-10, and Direct Federal Program Administrator

Date: September 25, 1985

Reply to
Attn. of: HEV-12

It is clearly the intent of the Freedom of Information Act (FOIA) to make information available to the public to the greatest extent possible. Each employee of the Federal Highway Administration (FHWA) carries this responsibility and is directed by regulation to cooperate in this effort. The National Environmental Policy Act (NEPA) also encourages an open process which fully involves the public. Accordingly, FHWA's environmental process provides opportunities for all members of the public to review, analyze, and comment on the impacts of major Federal actions significantly affecting the environment.

The FHWA has received a number of FOIA requests for the release of environmental impact statements (EISs) and documents relating to their development. In some cases, preliminary copies of the final EIS have been requested before the document has been approved by FHWA. Other situations involve requests for internal working papers, notes, and staff opinions pertaining to environmental decisions.

There are, however, two situations in which access to portions of this material can be denied under Exemption 5 of the FOIA and the Department of Transportation implementing regulation (49 CFR 7.71) pertaining to "Intragovernmental Exchanges." The first deals with the opinions, advice, deliberations, or recommendations made during the development of the environmental document but not actually made a part or supportive of the final decision. Such documents can be withheld at any time before or after the environmental decision is made. The second situation deals with material which is intended for public release at a specified time in the future (e.g., environmental documents, technical reports) when premature disclosure would be detrimental to the orderly processes of FHWA. Such material can be withheld during the development of the environmental document, but must be released after the environmental action is taken. The following discusses both of these situations in more detail.

Release of Internal Opinions, Advice, Deliberations, and Recommendations

Exemption 5 provides protection of the internal opinions, advice, deliberations, and recommendations made in the course of developing the environmental document but not actually made a part or supportive of that official action. As noted in 49 CFR 7.71 (b), the purpose of this section "is to protect the full and frank exchanges of ideas, views, and opinions necessary for the effective functioning of the government and to afford this protection both before and after any action is taken."

This exemption would apply to such recommendations made before the draft environmental document is released to the public (e.g., decisions regarding the appropriate range of alternatives) as well as those deliberations leading to the final environmental decision (e.g., finding of no significant impact (FONSI) of final EIS). In addition, working copies or preliminary drafts of these documents could be withheld under this exemption since they would contain preliminary conclusions not necessarily reflected in the final decision. This protection also typically applies to materials that would not be routinely released under disclosure procedures in litigation, i.e., "discovery." These generally involve documents or products covered by the attorney-client privilege which protects them from disclosure. However, the action itself (i.e., the categorical exclusion determination, the environmental assessment, the FONSI, the draft EIS, final EIS, and Record of Decision), any memoranda made part of that action, factual documents, and reports on which it is based cannot be withheld once that action is taken and released to the public.

The exemption also applies to the release of correspondence between FHWA and other Federal agencies when those documents contain recommendations and opinions not incorporated in FHWA's final decision. For the purposes of FOIA, this correspondence constitutes "intragovernmental exchanges" which can be withheld of their release would interfere with the deliberative process leading to the environmental decision.

Many of the deliberations leading to an environmental decision are between FHWA and the State highway agencies (SHAs). For the purposes of Title 23, the SHAs are not considered agents of the Federal Government. However, the State can be considered a consultant for FHWA for the purpose of complying with NEPA for specific Federal-aid projects. Section 102(2) (d) of the Federal agency "furnishes guidance and participates in such preparation" and provided "the responsible Federal official independently evaluates such statement prior to its approval and adoption." In this sense, Congress has made a specific statutory provision which allows the State to serve as a consultant for FHWA. Therefore, correspondence between the FHWA and the SHA pertaining to the entire NEPA process is considered "intragency" documentation and, if appropriate, can be protected under Exemption 5 of the FOIA.

Premature Release of Intragovernmental Exchanges

The NEPA process is, itself, a public disclosure process with specific steps for orderly public disclosure, timely public comment, and agency accountability to the public. Premature release of NEPA information under FOIA to only a segment of the public is inconsistent with NEPA. Therefore, in the course of processing the draft and final environmental documents, preliminary copies of those documents as well as any supporting documents, comments and/or reports should be withheld when premature release of that material would interfere with the deliberative process leading to FHWA's decision on whether to approve the draft or final environmental document for public release. This exemption would apply to final EISs transmitted by the Division to the Region and Washington Office for approval. This exemption is provided to assure that the quality of the agency's decisionmaking is not compromised by the inhibiting effect on agency personnel.

Since the FOIA requests for environmental documentation are frequently sent to both Headquarters and field offices, it would be prudent for all FHWA offices to use similar standards regarding the release of such material. We, therefore, recommend the preceding guidance be used when determining which documents can be released or denied under FOIA. If these documents should be denied in accordance with this policy, the FOIA requests should be forwarded to the Headquarters FOIA Program Officer (HMS-10) with a recommendation that the request be denied.

/ Original signed by/

Ali F. Sevin